

FEDERAL CIRCUIT COURT OF AUSTRALIA

LE & ANOR v MINISTER FOR IMMIGRATION & ANOR [2019] FCCA 3017

Catchwords:

MIGRATION – Application for Partner Visa – non-satisfaction of relevant criteria – adverse credibility findings made against applicant – no requirement for Tribunal to address domestic violence allegations where a genuine relationship was never found to have existed – no jurisdictional error established – application dismissed.

Legislation:

Migration Regulations 1994 (Cth), r.1.15A, Schedule 2, cl.801.221
Migration Act 1958 (Cth), ss.5F, 65

Cases cited:

Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham (2001) 74 ALJR 405
Minister for Immigration & Border Protection v Truong [2016] FCAFC 54
Minister for Immigration and Citizen v SZLAI [2009] 259 ALR 429
Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611
SZUXN v Minister for Immigration and Border Protection (2016) 69 AAR 210

First Applicant:	THI HONG DUOC LE
Second Applicant:	HOAN HAO NGUYEN
First Respondent:	MINISTER FOR HOME AFFAIRS
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	BRG 311 of 2019
Judgment of:	Judge Egan
Hearing date:	21 October 2019
Date of Last Submission:	21 October 2019
Delivered at:	Brisbane

Delivered on: 23 October 2019

REPRESENTATION

Counsel for the Applicant: Mr L Boccabella

Solicitors for the Applicant: T Lawyers

Solicitors for the Respondents: Sparke Helmore

ORDERS

- (1) The name of the First Respondent be amended to read ‘Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs’.
- (2) The application for review filed on 27 March 2019 be dismissed.
- (3) The Applicant pay the First Respondent’s costs of and incidental to the application for review fixed in the amount of \$7,467.00.
- (4)

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT BRISBANE

BRG 311 of 2019

THI HONG DUOC LE
First Applicant

HOAN HAO NGUYEN
Second Applicant

And

MINISTER FOR HOME AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. The applicant is a female citizen of Vietnam. She was born in 1966. She first arrived in Australia in October 2011 on a prospective marriage visa. The applicant married her sponsor on 11 October 2011.
2. The sponsor is an Australian citizen who was born in Vietnam in December 1969. The sponsor became an Australian citizen by Grant in February 1986.

3. On 18 November 2011 the applicant applied for a Partner (Residence) (Class BS) Visa pursuant to the provisions of s. 65 of the *Migration Act 1958* (Cth) (the Act).
4. On 16 September 2016 the delegate to the Minister refused to grant the visa to the applicant on the basis that the applicant had failed to demonstrate that the relationship between the applicant and her sponsor was consistent with two people being in a genuine and continuing relationship prior to its claimed breakdown. At the time of the delegate's decision the relationship between the applicant and the sponsor had ceased.
5. The applicant applied for review of the delegate's decision by the Administrative Appeals Tribunal (the Tribunal). The applicant appeared before the Tribunal on 13 February 2018. She was represented at the hearing by a registered migration agent, and she was assisted by an interpreter in the Vietnamese and English languages.
6. On 28 February 2019, the Tribunal affirmed the decision of the delegate not to grant to the applicant the visa.
7. At [3] of its reasons, the Tribunal summarised the delegate's reasons for refusing to grant the visa as follows:

"[3] The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221 because the delegate was not satisfied that the applicant was ever the spouse or de facto partner of the sponsor. At the time of the delegate's decision, the relationship between the applicant and sponsor had ceased, and the applicant claimed that she had suffered family violence committed by the sponsor. Given the delegate's findings in relation to the applicant and sponsor's relationship, the delegate did not proceed to consider the claim of family violence further."

8. At [7] of its reasons, the Tribunal confirmed that the issues before it were as follows:

"[7] The issue in the present case is whether the applicant was the spouse or de facto partner of the sponsor prior to the relationship ceasing, and if so whether the applicant suffered family violence committed by the sponsor."

9. At the hearing before this Court, Mr Boccabella of Counsel for the applicant relied upon the following Grounds for review:

Grounds of application

1. The tribunal failed to properly apply and/or interpret the provisions of Schedule 2 to the Migration regulations relating to the subclass 801 visa.

2. The tribunal made an error of law through not properly applying and/or interpreting cl.801.221(6) of Schedule 2 to the Migration Regulations 1994.

3. The tribunal failed to properly interpret and apply, Reg 1.15A of the Migration Regulations 1994 and/or 5F of the Migration Act 1958.

4. The tribunal set the bar too high in relation to applying and/or interpreting cl.801.221(6) of Schedule 2 to the Migration Regulations 1994.

5. The tribunal failed to properly conduct a review for the purpose of implementing Part 5 and/or ss 348 and 349 of the Migration Act 1958.

8. The tribunal failed to take relevant considerations into account.

10. The tribunal's decision was unreasonable.

11. The decision was otherwise unlawful.

10. Mr Boccabella indicated to the Court that Grounds 1 – 4 inclusive and 8 should be batched together, and that Grounds 5 and 10 were also to be batched together.

11. Section 5F of the Act provides as follows:

5F Spouse

*(1) For the purposes of this Act, a person is the **spouse** of another person (whether of the same sex or a different sex) if, under subsection (2), the 2 persons are in a married relationship.*

*(2) For the purposes of subsection (1), persons are in a **married relationship** if:*

(a) they are married to each other under a marriage that is valid for the purposes of this Act; and

(b) they have a mutual commitment to a shared life as a married couple to the exclusion of all others; and

(c) the relationship between them is genuine and continuing; and

(d) they:

(i) live together; or

(ii) do not live separately and apart on a permanent basis.

(3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

Note: Section 12 also affects the determination of whether the condition in paragraph (2)(a) of this section exists.

12. At [21] – [23] inclusive of its reasons, the Tribunal carefully considered the criteria for a court finding whether the applicant and the sponsor were in a married relationship as follows:

“[21] Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the ‘sponsoring partner’, who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the ‘sponsoring partner’ of the applicant.

[22] ‘Spouse’ is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a) - (d). In forming an opinion about these matters,

regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: He v MIBP [2017] FCAFC 206.

Are the parties validly married?

[23] If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. On the evidence, a marriage certificate registered on 25 October 2011, with respect to a marriage entered into on 11 October 2011, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a)."

13. At [22] of its reasons, the Tribunal specifically noted that for the purpose of deciding whether the provisions of s. 5F of the Act had been met or not, regard was to be had to all aspects of the relationship as provided for in regulation 1.15A(3) of the *Migration Regulations 1994* (Cth)(the Regulations). Regulation 1.15A provided as follows:

14. 1.15A Spouse

(1) For subsection 5F(3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F(2)(a), (b), (c) and (d) of the Act exist.

(2) If the Minister is considering an application for:

- (a) a Partner (Migrant) (Class BC) visa; or*
- (b) a Partner (Provisional) (Class UF) visa; or*
- (c) a Partner (Residence) (Class BS) visa; or*
- (d) a Partner (Temporary) (Class UK) visa*

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

(3) The matters for subregulation (2) are:

- (a) the financial aspects of the relationship, including:*
 - (i) any joint ownership of real estate or other major assets; and*
 - (ii) any joint liabilities; and*
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and*
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and*
 - (v) the basis of any sharing of day-to-day household expenses; and*
- (b) the nature of the household, including:*
 - (i) any joint responsibility for the care and support of children; and*
 - (ii) the living arrangements of the persons; and*
 - (iii) any sharing of the responsibility for housework; and*
- (c) the social aspects of the relationship, including:*
 - (i) whether the persons represent themselves to other people as being married to each other; and*
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and*
 - (iii) any basis on which the persons plan and undertake joint social activities; and*
- (d) the nature of the persons' commitment to each other, including:*
 - (i) the duration of the relationship; and*
 - (ii) the length of time during which the persons have lived together; and*
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and*

(iv) whether the persons see the relationship as a long-term one.

(4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

15. Under the heading “***Are the other requirements for a spouse relationship met?***” the Tribunal considered those matters required to be addressed by it for the purpose of determining whether a married relationship existed or not.
16. There is no question that the Tribunal, at [14] of its reasons, noted the basis on which the delegate had found that the applicant lacked credibility.
17. Central to Mr Boccabella’s argument advanced on behalf of the applicant was that because the Tribunal had found, at [23] of its reasons, that the parties were married to each other “under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a)”, the Tribunal had misdirected itself as to what was required of it when it failed to consider the issue of family violence raised by the applicant in her claims. It was submitted that because, at [81] of its reasons, the Tribunal had found that the applicant did not meet the criteria as set out clause 801.221(6)(b) of Schedule 2 to the Regulations, it must necessarily have found that a spousal relationship had existed and that, therefore, the Tribunal was obliged to consider the question of family violence under cl.801.221(6)(c)(1). It was submitted that because the Tribunal had not addressed the issue of family violence, the Tribunal had fallen into jurisdictional error.
18. Being alive to the issues which had to be considered by it, the Tribunal made adverse credibility findings against the applicant in a process singularly governed by its own impression of the applicant based on the evidence before it.¹ It did so in a reasoned and considered way at [74] – [76] of its reasons as follows:

“[74] The Tribunal found the applicant to be confused, evasive and contradictory in her evidence. The Tribunal notes that, notwithstanding the applicant was present throughout the hearing, including when her migration agent summarised his

¹ *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2001) 74 ALJR 405 at [67] per McHugh J.

misgivings regarding her previous agent (the oral discussion of which was interpreted by the interpreter for the benefit of the applicant), and notwithstanding it had read lengthy excerpts from the statutory declaration verbatim, and which were also interpreted by the interpreter for the applicant's benefit, she raised no concerns regarding the content of the statutory declaration until almost the end of the hearing. The Tribunal put internal inconsistencies within the applicant's oral evidence to her. The Tribunal also put inconsistencies between the applicant's oral evidence and her statutory declaration of 20 October 2014 to her. As canvassed above, the applicant was unable to explain any of the material inconsistencies adequately.

[75] The Tribunal found the chronologies of events claimed in oral evidence and/or the applicant's statutory declaration of 20 October 2014 to be inconsistent with the parties being in a genuine and continuing relationship. The Tribunal's concerns regarding the applicant's credibility are compounded by the fact that she provided a statutory declaration to the Department dated 16 October 2013 declaring inter alia that she had a mutual commitment to a shared life as husband and wife to the sponsor, and that they had lived together at the same address since she arrived in Australia in October 2011, for 22 months (as at that date) when she gave oral evidence to the Tribunal that the parties ceased living together in August 2013. Further inconsistencies in relation to the length of time the parties lived together is contained in the delegate's decision which refers to the fact that at the interview with the Department on 3 June 2014 the applicant initially stated that she moved out of the home she shared with the sponsor in March 2013, but subsequently stated that she moved out in August 2013.

Conclusions

[76] Based on all of the evidence before it, the Tribunal does not consider the applicant and sponsor had a mutual commitment to a shared life to the exclusion of others, were in a genuine and continuing relationship, and lived together or did not live separately and apart on a permanent basis. Rather, the Tribunal finds the circumstances of this matter to be consistent with a relationship contrived in order to obtain permanent residency for the applicant. In that regard, the Tribunal considers the limited documentary evidence provided to have been staged for that purpose. The Tribunal also considers such a finding to be consistent with the parties' willingness to become engaged only three weeks after meeting in real life."

19. At [79] of its reasons, the Tribunal made findings about the lack of the applicant and her sponsor having had a genuine and continuing relationship, at any time, as follows:

“[79]...It also accepts that the level of commitment to the relationship on the part of the parties does not need to be equal, but that it does need to be mutual, and that sexual infidelity does not necessarily mean the relationship is not a genuine spousal one. In this case however, the Tribunal is of the view that the relationship was contrived for the sole purpose of obtaining a migration outcome, and that the sponsor at no time had a mutual commitment to a shared life to the exclusion of others, or regarded the relationship as genuine and continuing, nor did he and the applicant live together or not separately and apart on a permanent basis. In coming to that conclusion, the Tribunal has considered all of the circumstances of the relationship, as canvassed above, including the financial and social aspects of the relationship, the nature of the parties household and commitment, and all of the integers of those matters as set out in r.1.15A(3). Taking into account all of the evidence, for the reasons set out above, the Tribunal is not satisfied that at any time the applicant and sponsor had a mutual commitment to a shared life as a married couple to the exclusion of all others, or that their relationship was at any point in time genuine and continuing.”

20. At [77] – [78] of its reasons, the Tribunal had had regard to relevant authorities which assisted it in its consideration of the evidence on the question as to whether the relationship between the applicant and her sponsor was genuine and continuing.
21. The Tribunal carefully dealt with all relevant issues at [24] – [68] inclusive of its reasons.
22. As to Grounds 1 – 4 and 8 of the application for review, the applicant failed to demonstrate that the Tribunal erred. The Tribunal made clear and concise findings to the effect that the relationship between the applicant and the sponsor was not genuine. The Tribunal found that the spousal relationship had not been established. Having done so, the Tribunal did not then have to consider the issue of domestic violence which had been raised by the applicant. As was said by Tracey, Flick and Griffiths JJ in *Minister for Immigration & Border Protection v Truong* [2016] FCAFC 54 at [46]:

“[46] As this statutory structure makes clear, there is “little utility” in considering the issue of “family violence” for the purposes of cl 820.221(6)(c) unless the spousal relationship is first established: Kaur v Minister for Immigration and Border Protection [2014] FCA 1251. In the context of considering a like requirement imposed by cl 820.221(3), Murphy J there concluded:

[43] As I have said, the Tribunal was not satisfied that the appellant and her sponsor were in a genuine spousal relationship at the time of the visa application. I consider that the Tribunal was not obliged to consider the issue of family violence ...

[44] In the context of an application for a partner visa there is little utility in considering the issue of family violence unless a spousal relationship for the purposes of 820.211(2) is first established. As the Tribunal found that the appellant failed to establish the necessary relationship at the time of the visa application, there was no requirement for it to assess the issue of family violence.

An application seeking special leave to appeal to the High Court of Australia was dismissed: Kaur v Minister for Immigration and Border Protection [2015] HCASL 27. In dismissing that application, Hayne and Nettle JJ observed that there was “no reason to doubt the correctness of the conclusions reached...”.”

23. As to Grounds 5 and 10 of the application for review, those Grounds are without merit. The Tribunal made findings contrary to the interests of the applicant based on the evidence before it, as it was entitled to do. It specifically addressed the time of the alleged breakdown of the relationship, finding at [52], [57] and [68] of its reasons that the relationship was not genuine. At [79] of its reasons, the Tribunal found that after having considered all of the evidence before it, it was not prepared to accept that a genuine and continuing relationship had ever existed.
24. The Tribunal made no relevant findings concerning events after the alleged August 2013 separation/relationship breakdown date. It could not therefore be accused of muddying the waters in respect of any of its pre August 2013 findings. Read together, Grounds 5 and 10 are misconceived.
25. It cannot be said that the Tribunal, when so analysing the matters of relevance before it, failed to make an obvious inquiry about a critical

fact, as was the subject of consideration by French CJ, Gummow, Hayne, Crennan, Keifel and Bell JJ in *Minister for Immigration and Citizen v SZIAI* [2009] 259 ALR 429 at [25] - [27], where it was said:

“[25] Although decisions in the Federal Court concerned with a failure to make obvious inquiries have led to references to a “duty to inquire”, that term is apt to direct consideration away from the question whether the decision which is under review is vitiated by jurisdictional error. The duty imposed upon the tribunal by the Migration Act is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction.³⁵ It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error. It is not necessary to explore these questions of principle in this case. There are two reasons for that.

[26] The first reason is that there was nothing on the record to indicate that any further inquiry by the tribunal, directed to the authenticity of the certificates, could have yielded a useful result. There was nothing before the Federal Magistrates Court or the Federal Court to indicate what information might be elicited if the tribunal were to undertake the inquiry which was said to be critical to the validity of its decision. The inquiry suggested was telephone contact with the persons whose mobile telephone numbers were shown on the certificates. But the question whether the certificates contained false statements as to authorship or otherwise would not be able to be determined by calls placed to those telephone numbers. If the respondents to the calls admitted to the tribunal or its officers that the certificates contained false statements, then the grounds for a decision adverse to SZIAI would have been strengthened. If the respondents said that the contents were true, it would have added nothing to the statements effectively conveyed by the certificates themselves. The second reason is that the response made by SZIAI’s solicitors to the tribunal’s letter of 14 January 2008 itself indicated the futility of further inquiry. There was nothing that SZIAI or his solicitors were able to add, beyond a bare denial of what appeared in the National Ameer’s letter. For these reasons there is no factual basis for the conclusion that the failure to inquire constituted a failure to undertake the statutory duty of review or that it was otherwise so unreasonable as to support a finding that the tribunal’s decision was infected by jurisdictional error.

[27] No issue of procedural fairness otherwise arises. SZIAI was given an opportunity to comment upon the National Ameer's letter and did so in the limited terms indicated. To invite SZIAI to a further hearing pursuant to s 425 of the Migration Act would have been an empty exercise. There was no such obligation in any event. The National Ameer's letter was by way of information that the tribunal considered would be a reason, or part of a reason, for affirming the decision under review. It discharged its obligation, pursuant to s 424A of the Migration Act, by giving SZIAI the opportunity to comment on that information. The letter did not raise a new issue in the sense that that term is used in s 425."

26. Further it cannot be said that no other rational or logical decision maker could not have made the same decision. As was said by Crennan and Bell JJ in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [130] and [135]:

"[130] In the context of the Tribunal's decision here, "illogicality" or "irrationality" sufficient to give rise to jurisdictional error must mean the decision to which the Tribunal came, in relation to the state of satisfaction required under s 65, is one at which no rational or logical decision maker could arrive on the same evidence. In other words, accepting, for the sake of argument, that an allegation of illogicality or irrationality provides some distinct basis for seeking judicial review of a decision as to a jurisdictional fact, it is nevertheless an allegation of the same order as a complaint that a decision is "clearly unjust" or "arbitrary" or "capricious" or "unreasonable" in the sense that the state of satisfaction mandated by the statute imports a requirement that the opinion as to the state of satisfaction must be one that could be formed by a reasonable person. The same applies in the case of an opinion that a mandated state of satisfaction has not been reached. Not every lapse in logic will give rise to jurisdictional error. A court should be slow, although not unwilling, to interfere in an appropriate case.

...

[135] On the probative evidence before the Tribunal, a logical or rational decision maker could have come to the same conclusion as the Tribunal. Whilst there may be varieties of illogicality and irrationality, a decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on the material before the decision maker. A decision

might be said to be illogical or irrational if only one conclusion is open on the evidence, and the decision maker does not come to that conclusion, or if the decision to which the decision maker came was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn. None of these applied here. It could not be said that the reasons under consideration were unintelligible or that there was an absence of logical connection between the evidence as a whole and the reasons for the decision. Nor could it be said that there was no probative material which contradicted the first respondent's claims. There was. The Tribunal did not believe the first respondent's claim that he had engaged in the "practice of homosexuality" in the UAE and accordingly it was not satisfied that he feared persecution if he returned to Pakistan."

27. In *SZUXN v Minister for Immigration and Border Protection* (2016) 69 AAR 210, when discussing whether jurisdictional error had been demonstrated where some factual findings had been made which were either irrational or illogical, Wigney J, at [55], said:

"[55] Nevertheless, allegations of illogical or irrational reasoning or findings of fact must be considered against the framework of the inquiry being whether or not there has been jurisdictional error on the part of the Tribunal: SZRKT at 137 [148]. The overarching question is whether the Tribunal's decision was affected by jurisdictional error: SZRKT at 137-138 [151]. Even if an aspect of reasoning, or a particular factual finding, is shown to be irrational or illogical, jurisdictional error will generally not be established if that reasoning or finding of fact was immaterial, or not critical to, the ultimate conclusion or end result: Minister for Immigration and Citizenship v SZOCT (2010) 189 FCR 577 at 598-599 [83]-[84] (Nicholas J); SZNKO v Minister for Immigration and Citizenship [2013] FCA 123 at [113]. Where the impugned finding is but one of a number of findings that independently may have led to the Tribunal's ultimate conclusion, jurisdictional error will generally not be made out: SZRLQ v Minister for Immigration and Citizenship (2013) 135 ALD 276 at 291 [66]; SZWCO at [64]-[67]."

28. The applicant has failed to establish jurisdictional error on the part of the Tribunal.
29. The application for review is dismissed.

30. The Court will hear the parties as to costs.

I certify that the preceding twenty-nine (29) paragraphs are a true copy of the reasons for judgment of Judge Egan

Associate:

Date: 23 October 2019